No. 90-507

In The

Supreme Court of the United States

October Term, 1990

E. WARNER BAILEY AND WIFE,
NONA ANN BAILEY,

Petitioners,

v.

EAST TEXAS PRODUCTION CREDIT
ASSOC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE EAST TEXAS PRODUCTION CREDIT ASSOCIATION, RESPONDENT, IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly ruled that no evidence appears in the record to indicate a discrepancy between the agreement reached by the parties and the Agreed Final Judgment.

2. Whether the court of appeals properly rejected Petitioners' contention that the district court placed improper restraints on the presentation of evidence at the July 18, 1989, hearing.

3. Whether the court of appeals properly excluded certain evidence alleged to be relevant to the FDIC's position in the case when the evidence was not presented before the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is unreported. The Agreed Final Judgment of the district court (Pet. App. A20-A25) is unreported.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered its opinion (Pet. App. A1-A19) April 26, 1990, and denied a Petition for Rehearing (Pet. App. A26-A27) on May 29, 1990. E. Warner Bailey and Nona Ann Bailey obtained an Extension of Time to File a Petition for Writ of Certiorari and filed their Petition for Writ of Certiorari on September 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 18, 1983, the Association loaned the Baileys over $91,000.[1] In connection with the loan, the Baileys executed a real estate lien note and, as security, executed a deed of trust to a 150.7 acre tract of land. As an additional inducement for the loan, the Baileys signed an affidavit of homestead disclaimer. (III R. A-1.) This same 150.7 acre tract was also encumbered by deeds of trust in favor of First RepublicBank-Lufkin and the SBA. The Baileys had also executed deed of trust liens to two other tracts of land (totalling 111.77 acres) in favor of First RepublicBank-Lufkin and the SBA.

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[1] For the sake of clarity, East Texas Production Credit Association will be termed simply "the Association," Federal Deposit Insurance Corporation will be termed "FDIC," the Small Business Administration will be termed "SBA," and E. Warner Bailey and Nona Ann Bailey, the petitioners, will be referred to collectively as "the Baileys" and individually by proper name.

The Baileys defaulted on payment of their obligations to the Association, to First RepublicBank-Lufkin, and to the Small Business Administration. Subsequently, First RepublicBank-Lufkin, in 1985, foreclosed on its liens on both the 111.77 acre tract and the 150.7 acre tract.

In September of 1985, the Baileys filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code, which was subsequently converted into a Chapter 7 proceeding.[2] In the Schedule B-4 attached to that petition, they claimed an unspecified 200 acres of real property located in Cherokee County, Texas, as exempt under Texas Homestead Laws. The Association and First RepublicBank-Lufkin objected to the exemption of the 150.7 and 111.77 acre tracts to the extent the Baileys proposed to include these in their homestead claim.

On June 3, 1986, the Association filed its original complaint in Adversary Proceeding No. A-86-161 seeking a determination of the dischargeability of the Baileys' debt to it and, alternatively, seeking a determination that a 150.7 acre tract of property owned by the Baileys and subject to a security interest in favor of the Association not be set aside as exempt. (III R. A-1.) The Baileys answered, claiming that the property constituted their rural homestead and that their previous affidavit of homestead disclaimer was ineffective. (III R. 3.)

In August of 1986, the Association filed a second adversary proceeding, No. A-86-250, requesting that the

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[2] This primary bankruptcy proceeding is still an active case, Cause No. TY-85-00814, pending before the United States Bankruptcy Court for the Eastern District of Texas.

court determine what portions of the Baileys' real property constituted their homestead. RepublicBank-Lufkin and the SBA, by virtue of their claims as lienholders to the Baileys' property, were joined as defendants to this adversary proceeding. The pleadings in that proceeding placed the homestead character of the 150.7 acre tract, as well as a 111.77 acre combined tract, and all liens on those tracts in issue.

The bankruptcy court consolidated Adversary Proceeding A-86-161 with Adversary Proceeding A-86-250, *sua sponte*. On February 9, 1988, the district court entered its order withdrawing its reference of the consolidated proceedings and assigned the former A-86-161 as Civil Action No. TY-88-00151 and the former A-86-250 as Civil Action No. TY-88-00153. (II R. 363-64.) Pursuant to the Association's motion, the district court ordered these proceedings reconsolidated. (II R. 342.)

The Baileys themselves filed an adversary proceeding, No. 86-399, in the bankruptcy court seeking to void RepublicBank's previous foreclosure on its liens to the Baileys' property and alleging Texas Deceptive Trade Practices Act violations, fraud, and wrongful foreclosure. Neither that proceeding nor the primary bankruptcy case was ever consolidated with the present action.

Upon the subsequent receivership of RepublicBank-Lufkin, the district court ordered the FDIC, as the bank's receiver, substituted as a party. (II R. 299.) Once properly substituted, the FDIC filed a motion for summary judgment on the validity of its deed of trust liens to three tracts of the Baileys' land, including the 150.7 acre tract.

(II R. 330.) The Baileys' counsel stipulated to the propriety of the motion and, on September 21, 1988, the district court granted the requested summary judgment. (II R. 296.)

Finally, on July 18, 1989, the district court, over the Baileys' objection (III R. A-10), ordered that Howard Lee Norris be permitted to withdraw as attorney for the Baileys and, that same day, entered an Agreed Final Judgment per the stipulations entered in open court at the September 12, 1988, docket call and the stipulated summary judgment. (I R. 4.) All material terms of the judgment having been stipulated, there was no necessity for a trial on the merits and none was had.

Curiously, the Baileys failed to file any motion to amend or alter the judgment as allowed under Rule 59 of the Federal Rules of Civil Procedure but rather, within a week of judgment, filed their notice of appeal. The Court of Appeals for the Fifth Circuit affirmed the district court's judgment, finding no abuse of discretion because the Baileys offered no evidence in the district court of any proper grounds for setting aside the stipulations. (Pet. App. A19.) The court of appeals stated that only two questions were relevant to the appeal: "(1) whether the agreements or stipulations that gave rise to this judgment were valid under Texas law, and (2) whether the judgment accurately reflects the terms of those agreements or stipulations." (Pet. App. A10.) The circuit court determined that none of the Baileys' allegations with respect to these questions were raised at the hearing when the Agreed Final Judgment was entered, nor did the Baileys "plead any of these grounds for relief in their filed responses to the proposed agreed final judgment or the

FDIC's motion for summary judgment." (Pet. App. A18.) Also, the court held that the district court had not constrained the Baileys from presenting such evidence. (Pet. App. A16.)

ARGUMENT

1. The court of appeals dealt thoroughly with the issue of whether the Agreed Final Judgment accurately reflected the stipulations of the parties. The appellate court stated that the Baileys' challenges to the agreed judgment were raised "for the first time on appeal," (Pet. App. A13), and affirmed the district court's action because "the district court cannot have erred if it was never given the opportunity to consider an issue in the first place." (Pet. App. A14-A15) (citing *Donovan v. Hamm's Drive Inn*, 661 F.2d 316, 317 (5th Cir. 1981) and *Stanley Educational Methods, Inc. v. Becker C.P.A. Review Course, Inc.*, 539 F.2d 393, 394 (5th Cir. 1976).)

Indeed, the Baileys did not raise in the district court any of the grounds for setting aside the stipulations that they asserted on appeal. (Pet. App. A18.) The judgment itself recites that (1) all parties appeared through counsel of record, with the Baileys appearing in person and through counsel, (2) the parties announced to the court that a settlement had been reached, and (3) the parties' agreement was dictated into the record in open court as a stipulation between them. (I R. 4-5.) The record indicates clearly that the Agreed Final Judgment does not deviate materially from the stipulations entered of record. On

September 12, 1988, the Baileys and their counsel stipulated that:

> . . . the Association had a valid first lien against the 150.7 acre tract (III Supp. R. 6) (germane to first decretal paragraph of Agreed Final Judgment);
>
> . . . the balance owed on the May 18, 1983, note to the Association was $124,000 (III Supp. R. 7) (germane to second decretal paragraph of Agreed Final Judgment);
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> . . . the SBA had a valid second lien to the 150.7 acre tract (III Supp. R. 7) (germane to third decretal paragraph of Agreed Final Judgment);
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> . . . RepublicBank-Lufkin had a valid third lien against the 150.7 acre tract, which was validly foreclosed before the Baileys filed their bankruptcy petition (III Supp. R. 7) (germane to fourth decretal paragraph of Agreed Final Judgment); and
>
> . . . the claims of the Association, First RepublicBank-Lufkin, and the SBA seeking declarations of non-dischargeability would be dismissed (III Supp. R. 9) (germane to fifth decretal paragraph of Agreed Final Judgment).

Thus, the Agreed Final Judgment accurately reflects the stipulations entered in open court.

Not only did the Baileys fail to allege any discrepancies in the Agreed Final Judgment at the district court level, but they actually fail to do so here as well. What they do claim is that an agreement which did not make it into the final judgment "gave them the right to purchase certain encumbered farm equipment at a specified price, with the understanding that the deficiency on the note secured by that equipment would become an unsecured

debt discharged in the bankruptcy." (Pet. App. 23) (quoting opinion of appeals court). The Association did in fact agree to allow the Baileys to pay for certain personal property in the pending bankruptcy case, which agreement was reduced to writing and approved by order of the bankruptcy court dated March 1, 1989, and which was not a part of the adversary proceeding before the district court.[3] The Baileys never tendered the agreed amount, choosing not to take advantage of the agreement they try to resurrect here. After 90 days, the automatic stay lifted as to that property when the Baileys reneged on their agreement to pay the Association. *In re Bailey*, No. TY-85-00814 (Bankr. E.D. Tex., filed Sept. 3, 1985). The Baileys defy all logic when they claim that this agreement, which they failed to live up to, should have been included in the stipulated judgment long after the agreement itself expired.

Even if the agreement the Baileys refer to had been a part of this proceeding, and even if they had not themselves reneged on it, they still would be unable to overcome the fact that no evidence of such an agreement was brought up in the district court. The record indicates that

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[3] The bankruptcy court approved the stipulation as contained in the Association's motion: "On August 2, 1988, counsel for Movant, for the Debtor and for the Trustee appeared at the preliminary hearing and announced their stipulation into the record that: (i) the debtor would redeem the subject property for the sum of $3,950.00 within 90 days, or (ii) the automatic stay would terminate." Amended Motion for Entry of Order Approving Stipulation Terminating Stay at 1-2, *In re Bailey*, No. TY-85-00814 (Bankr. E.D. Tex., filed Sept. 3, 1985).

the Baileys brought an issue to the district court's attention which the court of appeals recognized as "an ill-defined complaint regarding ETPCA's activities in one of the related cases pending in the bankruptcy court," (Pet. App. A17), and the Baileys claim that this shows they did allege a discrepancy in the Agreed Final Judgment before the district court. In fact they assert that this evidence relates to the "exact same issue" as the agreement they now claim was left out of the judgment. (Pet. App. 24.) This only confuses matters. The Baileys referred to the matter separately before the district court because even they knew it was not a part of the adversary proceeding and belonged only in the bankruptcy court. Only later, in desperation, did they claim this was an agreement which should have been included in the judgment. In their brief to the court of appeals, the Baileys referred to statements made out of court, statements for which no evidence appeared in the record, to support this claim. Even had there been some evidence in the record to support their contention, the Baileys failed to preserve their claim by raising it before the district court and may not attempt to retry the case on a new theory at this late date. *In re Goff*, 812 F.2d 931, 933 (5th Cir. 1987). The court of appeals stated that "the Baileys concede that they did not raise below their allegations . . . that the agreed judgment failed to accurately reflect the real settlement between the parties." (Pet. App. A15.) Neither did the Baileys file any motion to alter or amend the judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure. Therefore, the Baileys' allegation does not require review by this Court.

2. The Baileys contend that the court of appeals erred in ruling that no restraints were placed upon them

during the hearing in the district court on July 18, 1989. They claim the district court improperly prevented them from presenting any arguments against the Agreed Final Judgment by limiting "discourse . . . to the issues of fraud and mistake." (Pet. App. A15.) The court of appeals examined this issue in depth. The court recognized that "if the [district] court really had prevented the Baileys from presenting evidence on any issues other than fraud or mistake, they might indeed be entitled to a remand for a second opportunity to prove their claims," but it found no evidence of such restraints in the record. (Pet. App. A16.)

Aware that the district court had professed at one point that it would limit the discussion at the hearing, the court of appeals nevertheless determined that the district court had not in fact put any restraint on discussion. Instead, the district court had asked Mr. Bailey "if he had 'anything else' to present" and had allowed him to proceed at length and without interruption with matters which the court of appeals ultimately characterized as "irrelevant to the validity of the stipulations."[4] (Pet. App. A17-A18.)

The Baileys are simply wrong when they assert that the circuit court "conceded that the U.S. District Court

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[4] It was during this presentation of irrelevant matters that Mr. Bailey mentioned what he now claims was an agreement left out of the stipulated judgment. As discussed above, the district court and the court of appeals both determined the matter was irrelevant to this proceeding. Even Mr. Bailey knew that this matter was part of a pending bankruptcy proceeding in a different court and only on appeal asserted that it was evidence relevant to this proceeding.

did in fact restrain the Baileys." (Pet. App. 29.) Again, the court of appeals was aware of the district court's language purporting to limit discourse at the hearing, but after examining the record, the court stated emphatically that "that, however, [was] not the case." (Pet. App. A16.)

The Court of Appeals for the Fifth Circuit correctly held that no restraints were placed upon the Baileys at the July 18, 1989, hearing and that they raised no claims at that hearing which would bear on the claims they made on appeal. Because the court of appeals considered these matters fully and properly, they plainly do not warrant this Court's review.

3. The Baileys assert that the court of appeals erred in not considering evidence which they allege was not available to them in the district court, which evidence supposedly bore on the FDIC's position in the case. To the extent, if at all, that the Baileys' claim respecting the FDIC and the off-record evidence applies to the Association, the Association adopts any argument urged in opposition by the FDIC.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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